

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1902.

No. 1175.

136

JACOB P. CLARK, APPELLANT,

vs.

JOSEPH BARBER, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JANUARY 29, 1902.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1902.

No. 1175.

JACOB P. CLARK, APPELLANT,

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In the Court of Appeals of the District of Columbia.

JACOB P. CLARK, Appellant, }
vs. } No. 1175.
JOSEPH BARBER, Trustee. }

a Supreme Court of the District of Columbia.

JOSEPH BARBER, Trustee, Plaintiff, }
vs. } At Law. No. 40539.
JACOB P. CLARK, Defendant. }

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Amended Declaration.*

Filed March 18, 1897.

In the Supreme Court of the District of Columbia.

JOSEPH BARBER, Trustee, Plaintiff, }
vs. } At Law. No. 40539.
JACOB P. CLARK, Defendant. }

The plaintiff, by leave of the court first had and obtained, amends his declaration by substituting the following:

The plaintiff, Joseph Barber as trustee of the estate of Jessie Barber, deceased, sues the defendant, Jacob P. Clark, for money payable by the defendant to the plaintiff as trustee as aforesaid, for that the said plaintiff heretofore, to wit, on the 18th day of June, A. D. 1894, in the high court of justice, common pleas division, at Brampton, Ontario, in the Dominion of Canada, the same being a court of record, recovered against the said defendant a decree for the payment of "the sum of \$7,423.50, with interest thereon from the 30th day of June, 1892, but deducting from the said amount the sum of \$5,000 paid by the said defendant to the said Joseph Barber on the 6th day of October, 1892, and the further sum of \$500 similarly paid on the 13th day of October, 1892, with interest on the said sums of \$5,000 and \$500 from the date of their respective payments," whereof the defendant was convicted, (as will appear by a transcript of the record

of the said decree and of the proceedings in the said cause filed herewith as part hereof), and the said plaintiff has not obtained any payment or satisfaction of the said decree, other than credited therein, and the same remains in full force and effect, unreversed and unsatisfied, and the plaintiff claims to recover the said sum of \$7,423.50 (equivalent to \$7,423.50 in the currency of the United States of America) with interest thereon from the 30th day of June, 1892, less \$5,000 paid October 6, 1892, and \$500 paid October 13, 1892, besides the costs of this suit.

W. H. SHOLES,
HAYDEN JOHNSON,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

W. H. SHOLES,
HAYDEN JOHNSON,
Attorneys for Plaintiff.

Second Amended Declaration.

Filed October 1, 1900.

In the Supreme Court of the District of Columbia.

JOSEPH BARBER, Trustee, Plaintiff,	} At Law. No. 40539.
vs.	
JACOB P. CLARK, Defendant.	

3 The plaintiff by leave of the court first had and obtained, amends his amended declaration by substituting the following:

The plaintiff, Joseph Barber as trustee of the estate of Jessie Barber, deceased, sues the defendant, Jacob P. Clark, for money payable by the defendant to the plaintiff as trustee as aforesaid, for that the said plaintiff heretofore, to wit, on the third day of May, A. D. 1894, in the high court of justice, common pleas division, at Brampton, Ontario, in the Dominion of Canada, the same being a court of record, and having jurisdiction of the defendant and of the subject-matter of the action, recovered against the said defendant a decree for the payment of "the sum of \$7,423.50, with interest thereon from the 30th day of June, 1892, but deducting from the said amount the sum of \$5,000 paid by the said defendant to the said Joseph Barber on the 6th day of October, 1892, and the further sum of \$500 similarly paid on the 13th day of October, 1892, with interest on the said sums of \$5,000 and \$500 from the date of their respective payments," whereof the defendant was convicted, as by the record and proceeding thereof remaining in said court will fully appear, and the said plaintiff has not obtained any payment or satisfaction of the said decree, other than credited therein, and the same

remains in full force and effect, unreversed and unsatisfied plaintiff claims to recover the said sum of \$7,423.50 in the currency of the United States of America, interest thereon from the 30th day of June, 1892, less, \$1,000 paid October 6th, 1892, and \$500 paid October 13th, 1892, balance of this suit.

W. H. SHOLES
HAYDEN JOHNSON
Attorneys

4 The defendant is to plead hereto on or before the 1st day, exclusive of Sundays and legal holidays, after the day of the service hereof; otherwise judgment.

W. H. SHOLES
HAYDEN JOHNSON
Attorneys

Copy of above amended declaration left at the residence of the defendant, the 1st day of April, 1901.
C. ELTON

Pleas to Amended Declaration.

Filed April 24, 1901.

In the Supreme Court of the District of Columbia

JOSEPH BARBER, Trustee, Plaintiff, }
vs. } No. 4053
JACOB P. CLARK, Defendant.

For pleas to the plaintiff's amended declaration says:—

1. That he never was indebted as alleged.
2. That there is no record of the judgment in the case mentioned.
3. That before the institution of suit herein he fully paid and discharged the amount claimed in said declaration.
- 5 4. That defendant was, at the time of the rendition of the decree in the said declaration mentioned, the owner of a large amount of real estate situate in the province of Ontario, in the Dominion of the United States, and subject to the jurisdiction and process of said court; that subsequent to the rendition of said decree, the said plaintiff as in said declaration alleged, caused to be issued out of said court a writ of execution against the real and personal property of the defendant as aforesaid, and there being more than sufficient to satisfy the amount of the plaintiff's claim herein, which said writ is still outstanding and in full force and effect, of its issuance was, and still is, a lien upon the real property of the plaintiff aforesaid; therefore, this

that the plaintiff ought not to have or maintain his aforesaid action against him in this jurisdiction.

5. For that The Toronto Mill Stock and Metal Company, plaintiffs, on the 14th day of November, 1888, in the county court in the county of York, at Toronto, in the province of Ontario, Dominion of Canada, the same being then and there a court of record, recovered against J. O. Hutton and J. P. Hutton, defendants, judgments for the sum of \$367.12 debt and the sum of \$17.56 for costs with interest thereon from the 14th day of November, 1888, until paid, together with subsequent costs, and the said plaintiffs have not obtained payment, execution or satisfaction of said judgments and the same remain in full

force and effect, unreversed and unsatisfied; and for that The

6 Toronto Mill Stock and Metal Company, plaintiffs, on the 28th day of August, 1888, in the high court of justice, Queen's Bench

division, in the province of Ontario, Dominion of Canada, the same

being then and there a court of record, recovered against J. O. Hut-

ton and J. P. Hutton, defendants judgments for the sum of \$236.41

debt besides \$28.94 costs with interest thereon from the 28th day of

August, 1888, and the said plaintiffs have not obtained payment,

execution or satisfaction of said judgment, and the same remains in

full force and effect unreversed and unsatisfied; and for that The

Toronto Mill Stock and Metal Company, plaintiff, on the 30th day

of August, 1888, in the county court of the county of York; at To-

ronto, Ontario, in the Dominion of Canada, the same being a court

of record, recovered against J. O. Hutton and J. P. Hutton, defend-

ants, judgment for the sum of \$222.62 debt, and the sum of \$17.76

for costs, with interest thereon from the 30th day of August, 1888,

until paid, and the said plaintiffs have not obtained payment, exe-

cution or satisfaction of the said judgment, and the same remains

in full force and effect, unreversed and unsatisfied; and for that The

Toronto Mill Stock and Metal Company, plaintiffs, on the 8th day

of September, 1888, in the high court of justice, Queen's Bench di-

vision, in Ontario, in the Dominion of Canada, the same being a

court of record, recovered against J. O. Hutton and J. P. Hutton,

defendants, judgment for the sum of \$402.99, for debt and the sum

of \$28.84 for costs, with interest thereon from the 8th day of Septem-

ber, 1888, until paid; and the said plaintiffs have not obtained pay-

ments, execution or satisfaction of said judgment, and the same re-

mainains in full force, unreversed and unsatisfied; and for that

7 the said Toronto Mill Stock and Metal Company, thereafter to

wit, on the 30th day of May, 1891, for value, signed and trans-

ferred to this defendant, the said hereinbefore several mentioned judg-

ments, and every sum or sums of money then due and thereafter to

become due by virtue thereof, for principal, interest and costs, and

all benefit to be derived therefrom either at law, or in equity, or

otherwise howsoever; and for that the said J. O. Hutton and J. P.

Hutton for the purpose of hindering and delaying and defeating

the said Toronto Mill Stock and Metal Company in the recovery of

the payment of the said several judgments claims; and for that the

said J. O. Hutton and J. P. Hutton, defendants in said suits, for the

purpose of hindering, delaying and defeating the said Toronto Mill,

Stock & Metal Company, plaintiff in said suits, in the recovery and payment of said several judgment claims, and affiant as the successor in interest of said company, thereafter, without consideration, conveyed all their real and personal estate by certain indentures by way of deed and mortgage in favor of James Barber and Agner F. Hutton, cocomplainiffs in said suit in which the decree in the said declaration was recovered, and for that thereafter, the said Joseph Barber, trustee, agreed with this defendant in consideration that this defendant would not press said several judgment claims and take further proceedings to vacate said fraudulent conveyances that he, the said plaintiff, Joseph Barber, trustee, would pay the amounts of said several judgments by crediting the same upon said decree in the said declaration mentioned; and the said defendant says that pursuant to the agreement aforesaid he did not further press said

several judgments and did not take further proceedings to vacate said fraudulent conveyances, wherefore he says that he has paid and is entitled to credit upon the amount of the plaintiff's claim herein for the amounts of the said several judgments, to wit the sum of \$367.12, \$17.56 costs of suit and interest from the 14th day of November, 1888; and on \$236.41, besides \$28.94 costs of suit with interest thereon from the 28th day of August, 1888; and on \$222.62 besides \$17.76 costs of suit with interest thereon from the 30th day of August, 1888; and on \$402.99 besides \$28.84 costs of suit with interest thereon from the 8th day of September, 1888.

6. And for that the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in the sum of \$2229.17 with interest according to the particulars of set-off hereto annexed, which said sum the defendant is willing shall be set off against the plaintiff's demand.

CLARENCE A. BRANDENBURG,
Attorney for Plaintiff.

9 *Particulars of Set-off.*

By amount of decree for costs in favor of the defendant against the plaintiff in the same decree now sued upon... \$1000.00

To the amount of four judgments in favor of The Toronto Mill Stock and Metal Company, plaintiff assigned to the defendant and payment of which the plaintiff promised by crediting the same upon the amount of the decree now sued upon as follows:

\$367.12, besides \$17.56 costs with interest from the 14th day of November, 1888;

\$236.44 besides \$38.94 costs with interest from the 28th day of August, 1888;

\$222.62 besides \$17.76 costs, with interest from the 30th day of August, 1888;

\$402.99 besides \$28.84 costs, with interest from the 8th day of September, 1888

Total..... \$2229.17

Memorandum.

November 18, 1901.—Verdict for plaintiff for \$7,423.50 with interest from June 30, 1892, less \$5000.00 paid Oct. 6, 1892 and \$500. so paid October 13, 1892.

12

Judgment.

Supreme Court of the District of Columbia.

SATURDAY, November 23, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

JOSEPH BARBER, Trustee, Plaintiff,	} At-Law. 40539.
<i>vs.</i>	
JACOB P. CLARK, Defendant.	

The time within which to move for a new trial having expired, judgment on verdict is ordered: Therefore it is considered that the plaintiff as trustee of the estate of Jessie Barber, deceased, recover against the defendant seven thousand four hundred and twenty-three dollars and fifty cents (\$7423.50), with interest thereon from the 30th day of June, 1892, less a credit of \$5000.00 paid October 6, 1892, and less a credit of \$500.00 paid October 13, 1892, being the money payable by said defendant to the plaintiff by reason of the premises, together with his costs of suit to be taxed by the clerk, and have execution thereof.

Notice of Appeal.

Filed November 30, 1901.

In the Supreme Court of the District of Columbia.

JOSEPH BARBER, Trustee, Plaintiff,	} No. 40539. Law.
<i>vs.</i>	
JACOB P. CLARK, Defendant.	

13 The clerk will please enter an appeal by the defendant to the Court of Appeals of the District of Columbia from the judgment in the above case, and issue citation to the plaintiff.

BRANDENBURG & BRANDENBURG,
Attorneys for Defendant.

Citation waived.

W. H. SHOLES,
HAYDEN JOHNSON,
Attorneys for Plaintiff.

Supreme Court of the District of Columbia.

THURSDAY, December 12, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * *

JOSEPH BARBER, Trustee, Plaintiff, }
vs. } At Law. No. 40539.
 JACOB P. CLARK, Defendant. }

Upon motion of the defendant it is ordered that the penalty of the bond on appeal for costs be, and hereby is fixed in the sum of one hundred dollars, or in lieu of a bond to deposit with the clerk the sum of one hundred dollars.

14

Memorandum.

December 12, 1901.—\$100 so deposited by appellant in lieu of appeal bond.

Supreme Court of the District of Columbia.

MONDAY, *December* 23, 1901.

Session resumed pursuant to adjournment, Chief Justice Bingham, presiding.

* * * * *

JOSEPH BARBER, Trustee, Plaintiff, }
vs. } At Law. No. 40539.
 JACOB P. CLARK, Defendant. }

Now again comes here the defendant by his attorney and tenders to the court here his bill of exceptions taken during the trial hereof, and prays that the same may be duly signed, sealed, and made part of the record now for then, which is done accordingly.

15

Bill of Exceptions.

Filed December 23, 1901.

In the Supreme Court of the District of Columbia.

JOSEPH BARBER, Trustee, Plaintiff, }
vs. } No. 40539. Law.
 JACOB P. CLARK, Defendant. }

Be it remembered that at the trial of the above-entitled cause, the plaintiff, under the pleadings therein to maintain the issue on his part joined, offered in evidence the following transcript of judgment, to wit:

[GREAT SEAL.]

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, etc., etc., etc., to all to whom these presents shall come, Greeting:

These are to certify that the "high court of justice for Ontario" is a duly and lawfully constituted court of record, having jurisdiction over all civil and criminal matters in and for that part of the Dominion of Canada called the province of Ontario.

That the Honorable John Alexander Boyd, is chancellor of the province of Ontario and that the name of J. A. Boyd attached to the certificate written under the annexed exemplification, is the true signature of the said John Alexander Boyd and is of his proper handwriting.

16-21 That James Augustus Austin is the local registrar of the high court of Brampton, in the county of Peel, and has the custody of the seal of our said high court, and of the pleadings, affidavits and writs and other proceedings filed of record therein, lawfully appointed. That the name "J. A. Austin" attached to the annexed exemplification, as the signature of said clerk of records and writs, is the true and genuine signature of the said James Augustus Austin and is of his proper handwriting, and that full faith and credence are due and ought to be given to such signatures and acts in all places, and that the seal attached to the next exemplification is the true and genuine seal of our said high court of justice for Ontario used at Brampton.

Given under the great seal of our said province of Ontario.

Witness, the Honorable Sir Oliver Mowat, knight, lieutenant governor of our said province.

At Toronto, this sixth day of October, in the year of our Lord one thousand eight hundred and ninety-nine and in the sixty-third year of our reign.

By command:

E. J. DAVIS,
Secretary of the Province of Ontario.

* * * * *

22

(*Pleadings.*)

"In the High Court of Justice, Common Pleas Division.

"Writ issued 23rd January, A. D. 1891.

"Between—

"JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,
"Plaintiffs,
"and
"JACOB P. CLARK, Defendant. }

"Statement of claim.

"1. The defendant is a real-estate agent residing in the city of Washington in the United States of America and who formerly resided in the city of Toronto in the county of York.

"2. The plaintiffs, Agnes F. Hutton and Isabella J. Cross are the residuary legatees under and by virtue of the last will and testament of Jessie Barber late of the village of Georgetown in the county of Halton, widow, deceased bearing date the third day of May, A. D. 1883.

"3. In and by the said will the said testatrix directed that the said plaintiffs Agnes F. Hutton and Isabelle J. Cross as residuary legatees as aforesaid should each be paid the sum of \$1000.00 annually out of the principal money of the estate of the said deceased and that the interest upon the whole estate from time to time remaining unpaid should after deducting certain payments as mentioned and set out in the said will be divided equally between the said

23 "Agnes F. Hutton and Isabella J. Cross share and share alike.

"4. On the 18th day of October A. D. 1890 there became due to each of the said plaintiffs Agnes F. Hutton and Isabella J. Cross under and by virtue of the said will the sum of \$1000.00 out of the principal money of the said estate and the sum of \$600.00 for interest upon the remainder of the said estate still remaining unpaid to them respectively. -

"5. The defendant duly proved the said will to the surrogate court of the county of Halton and took upon himself the burden and administration of the said estate.

"6. The said plaintiffs Agnes F. Hutton and Isabella J. Cross are also executors of and duly proved the said will but the defendant is the acting executor and is in possession of the whole of the estate of said deceased and he refuses to pay over the said installments and interest after demand duly made therefor.

"7. Under and by virtue of certain indentures of assignment of which the defendant had due notice, the plaintiff James Barber is assignee of and entitled to receive the said installments and interest but the said residuary legatees are joined as parties to this action in order that all the parties interested should be before the court and they pray that the defendant may be ordered and adjudged to pay the amount of the said installments and interest to the said plaintiff James Barber or in the event of the said assignments being held insufficient to entitle him to recover that the same may be paid to them. The plaintiff claims:

"1. Payment of the said sums of \$2000.00 and \$600.00 respectively.

24 "2. The costs of this action and such other and further order as may seem meet.

"The plaintiffs propose that this action should be tried at Brampton.

"Delivered this 23rd day of January, A. D. 1891 by Benjamin F. Justin of the town of Brampton in the county of Peel Solicitor for the plaintiffs.

"In the High Court of Justice, Common Pleas Division.

"Between—

"JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,
"Plaintiffs,
"and
"JACOB P. CLARK, Defendant.

"Statement of Defence.

"1. The defendant admits that Jessie Barber, late of the village
"of Georgetown in the county of Halton, widow, made her last will
"and testament dated the 3rd day of May 1883 and did thereby
"appoint the said Agnes F. Hutton (then Agnes F. Barber) and the
"said Isabella J. Cross, wife of William H. Cross—daughters of
"the said testatrix and me, the said Jacob P. Clark, the execu-
"trices and executor and trustees of the said will, and she thereby
"devised and bequeathed to the said executrices executor and trustees
"all her real and personal estate upon the trusts and to and for the
"uses, intents and purposes therein expressed and declared.

25 "2. The said Jessie Barber died on the 18th day of October
"1883 and the said plaintiffs Agnes F. Hutton and Isabella
"J. Cross and the said defendant Jacob P. Clark duly proved the
"said will in the surrogate court of the county of Halton on the
"19th day of November 1883 and the said defendant incorporates
"the probate of the said will herewith and will read it on the hear-
"ing of this action.

"3. The said will (amongst other things) provides that the said
"Agnes F. Hutton and Isabella J. Cross should not be entitled to
"any commission or charges and directs that the said defendant
"should be wholly entitled to and be paid the commission and
"charges for the administration of the estate and effects of the said
"testatrix.

"4. After the death of the said testatrix the said defendant by
"and with the consent of the said plaintiffs Agnes F. Hutton and
"Isabella J. Cross took possession of the estate and effects of the said
"testatrix and proceeded to carry into effect the trusts and powers
"of the said will and to administer the estate and effects and paid
"the just debts of the deceased, and made payments on account of
"the legacies contained in her will.

"5. The defendant rendered to the said plaintiffs Agnes F. Hutton
"and Isabella J. Cross yearly and every year until the year 1886,
"full statements and accounts of his management of and dealings
"with the affairs of the said estate, and in the month of February
"1886 he passed all his accounts as executor and trustee of the
"said will before his honor the judge of the surrogate court of the
"county of Halton, and he has yearly and every year since
26 "the year 1886 rendered to the said plaintiffs Agnes F. Hutton
"and Isabella J. Cross full statements and accounts of his
"management of the affairs of the said estate.

" 6. The said defendant was engaged in the real-estate business in
" the city of Toronto at the time he became the executor and
" trustee of the said will and he continued to carry on the said busi-
" ness until the year 1890 when he bought a large tract of land at
" the city of Washington in the District of Columbia in the United
" States of America and he has moved from the city of Toronto with
" his family and has become a permanent resident of the said city
" of Washington and is actively engaged in the developement and
" sale of his real estate.

" 7. No complaint was ever made by the said plaintiffs Agnes F.
" Hutton and Isabella J. Cross or either of them or on their behalf
" to the said defendant in regard to the management by him of the
" affairs of the said estate or in regard to the said statements and
" accounts until the defendant was arranging and winding up his
" affairs in Canada preparatory to his departure to Washington, and
" he then requested the said plaintiffs to release him and join with
" him in the appointment of a trustee to act in his place and stead
" to carry into effect the final administration of the estate and effects
" of the said deceased and to pay the accruing payments on account
" of the specific legacies contained in the said will and to pay the
" balance (if any) to the plaintiffs as residuary legatees.

27 " 8. The said plaintiffs Agnes F. Hutton and Isabella J. Cross
" have allowed their husbands to use the money paid to them
" by the defendant on account of the legacies bequeathed to
" them by the said will amounting in the aggregate to an approxi-
" mation of the sum of \$20,000 and the said money has been lost to
" the plaintiffs and neither of the said plaintiffs have any means
" which might be made available for the costs of an administration
" of the affairs of the estate if an administration should become nec-
" essary, except the balance (if any) which might be payable to them
" on the final taking of the accounts after providing for the specific
" legacies and the commission which the defendant would be enti-
" tled to.

" 9. An appointment was made by the defendant for a meeting
" with the said plaintiffs Agnes F. Hutton and Isabella J. Cross to
" pass the accounts of the defendant, to examine the investments and
" to appoint a new trustee in his place, and it was attended by the
" respective husbands of the said plaintiffs and their solicitors and
" after discussions and explanations in regard to the accounts a com-
" petent and independent accountant who was a member of the
" Institute of Chartered Accountants was appointed to examine and
" report on the said accounts and the said accountant examined the
" accounts and certified that they were correct with the exception
" of some trifling inaccuracies which were corrected.

" 10. A subsequent meeting was then held and was attended by
" the same parties to make a final adjustment and settlement on the
" basis of the account's report, but the said husbands of the said
" plaintiffs would not consent to close the said accounts and release
" the defendant unless he would submit to unreasonable claims
" which they made against him.

" 11. The defendant then
 " administration order with
 " usual accounts and make all the
 " and now is ready and willing an
 " administration order and to facil
 " means the prosecution of a refere

" 12. On the 22nd day of Decem
 " delivered on behalf of the plainti
 " one dated July 15th, 1889 made l
 " ton, to one Thomas W. Duggan l
 " the said Thomas W. Duggan for
 " W. Duggan to the said Agnes F.
 " husband on the security of a mor
 " real estate ; and an assignment t
 " ber 1890 made by the said Thom
 " tiff James Barber. The other dat
 " made by the said Isabella Jane
 " Barber by way of collateral mort
 " lent by him to her or for which
 " half, and the defendant will pro
 " refer to them on the hearing of t

" 13. The defendant has always
 " full account of all his managemen
 " of the said estate and he is ready
 " over to a trustee to be appointed
 " estate which remain in his hands

" he is liable or accountable

" 14. The defendant claim
 " termine and decide whet
 " money or assets in his hands to b
 " the said plaintiffs as residuary leg
 " ber as assignee, after making pro
 " the commission which the defend
 " titled to and for costs, expenses an
 " enquiries are made and accounts
 " tion order and until the final bal
 " the defendant shall be liable or
 " by this honorable court.

" 15. The defendant submits th
 " nounced on the plaintiff's statem
 " contained in the statement of def

"16. The defendant further alleges that an investment of the sum
 "of one thousand dollars of the moneys of the said estate has been
 "made by him at the request and by the consent of the said plain-
 "tiffs, the residuary legatees and that on the taking of the
 30 "said accounts the said investment shall be taken into account
 "and dealt with as an investment made by and with the con-
 "sent and sanction of the said residuary legatees.

"And the said defendant repeats the said statement of defence by
 "way of counter-claim and claims by way of counter-claim a judg-
 "ment for the usual order for the administration by this honorable
 "court for the estate and effects of the said testatrix and a discharge
 "from the office of trustee and executor of the said will upon com-
 "pliance with such order.

"Delivered this 16th day of March 1891 by Messrs. Bain, Laid-
 "law & Co., of the city of Toronto, solicitors for the defendant.

"In the High Court of Justice, Common Pleas Division.

"Between—

"JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,	}
"Plaintiffs,	
"and	
"JACOB P. CLARK, Defendant.	}

"*Reply.*

"1. The plaintiffs join issue upon the defendant's statement of de-
 "fence and counter-claim herein.

"2. And the plaintiffs further say by way of reply to the
 31 "said statement of defence and counter-claim that the de-
 "fendant has in his hands ample assets available for the
 "purpose of satisfying the claim of the plaintiffs in this action and
 "that the same should be ordered to be paid forthwith.

"3. And the plaintiffs further say by way of reply to the said
 "statement of defence and counter-claim that they have no desire
 "to have the defendant removed from his position as executor and
 "trustee, but that if he desires and seeks to be removed they are
 "willing that another trustee be appointed in his place and stead
 "upon the condition that all accounts be taken of the dealings of the
 "defendant as executor and trustee from the time the estate came
 "into his hands up to the time of accounting and that upon payment
 "over by him to such new trustee of the balances which may be
 "found in his hands he be discharged.

"Delivered this 6th day of April A. D. 1891 by Benjamin F. Justin
 "of the town of Brampton in the county of Peel solicitor for the
 "plaintiffs.

"In the High Court of Justice, Common Pleas Division.

"Between—

"JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,	}
"Plaintiffs,	
"and	
"JACOB P. CLARK, Defendant.	

"*Rejoinder.*

"1. The defendant refers to the 3rd paragraph of the reply of
 "the plaintiffs and alleges that before the commencement of
 32 "this action he offered and proposed to the plaintiffs to pass
 "all his accounts as executor and trustee of the will of the
 "executrix before the surrogate court or the high court of justice
 "and to transfer the balance of all the assets of the estate in his
 "hands to be administered to the proper trustee to be appointed in
 "his stead and he repeats the offer and proposal and consents to the
 "condition annexed to his removal from the office of trustee viz.—
 "that he shall not be entitled to his discharge until the accounts
 "shall be taken of his dealings with the defendant as executor and
 "trustee from the time the estate came into his hands up to the
 "time of his accounting and that he shall pay over to such new
 "trustee the balance which may be found in his hands after mak-
 "ing proper provision for the payment of costs and he further con-
 "sents to submit to such further and other order in respect thereof
 "as may be imposed by this honorable court.

"Delivered by special leave of the court this 18th day of April,
 "A. D. 1891 by Bain, Laidlaw & Kappeler of the city of Toronto in
 "the county of York solicitors for the defendant.

(Judgment at Trial.)

"In the High Court of Justice, Common Pleas Division.

"His Lordship Mr. Justice Street.

"Thursday, the Thirtieth Day of April, A. D. 1891.

"Between—

"JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,	}
"Plaintiffs,	
"and	
"JACOB P. CLARK, Defendant.	

"(Law stamp, \$1.60.)

"[L. S.]

"This action coming on to be heard this day at the assizes
 33 "holden at the town of Brampton in and for the county of
 "Peel for the examination of witnesses and hearing of causes
 "in presence of counsel for all parties upon opening of the matter

"upon hearing read the pleadings and upon hearing what was
 "alleged by counsel aforesaid.

"This court doth order and adjudge:—

"1. That it be referred to the local master of the supreme court of
 "judicature for Ontario at Brampton to take accounts of the defend-
 "ant Jacob P. Clark and of the plaintiffs Agnes F. Hutton and
 "Isabella J. Cross as executors and trustees of the estate of Jessie
 "Barber deceased the testatrix in the pleadings herein mentioned
 "from the time the estate came into their hands up to the time of
 "their accounting.

"2. And the said master is to inquire and state who are the per-
 "sons entitled to share in the estate of the said testatrix and in what
 "proportions.

"3. And this court doth further order and adjudge that *that* the
 "said local master do name some suitable and proper person to be
 "appointed trustee in the place of the said defendant Jacob P. Clark
 "who has left the jurisdiction of this honorable court.

"4. And it is ordered that the further directions and costs be re-
 "served until after the said local master shall have made his report.

"5. And it is ordered that the said local master do make his
 "report within six months from the date hereof.

"Judgment signed the 5th of May, 1891.

"(S'g'd)

J. A. AUSTIN,

"*Local Registrar at Brampton.*

"Judgment entered 5th May 1891 in High Court Judgment Book
 "folio 107.

34 "(S'g'd)

J. A. AUSTIN,

"*Local Registrar at Brampton.*

(Order Appointing New Trustee.)

"In the High Court of Justice, Common Pleas Division.

"Before the Hon. Sir Thomas Galt, Chief Justice.

"In Court, Friday, the Sixteenth Day of December, 1893.

"Between—

"JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,	}
"Plaintiffs,	
"and	
"JACOB P. CLARK, Defendant.	

"(Law stamp, \$1.20.)

"This action having been by judgment herein bearing date the
 "30th day of April, 1891, referred to the local master of the court at
 "Brampton for the naming of some suitable and proper person to be
 "appointed trustee of the will of Jessie Barber the testatrix in the
 "pleadings mentioned in the place of the defendant Jacob P. Clark

"who had left the jurisdiction of this honorable court and for the
"taking of certain accounts and otherwise as in said judgment will
"appear and the said local master having his report of the matters
"so referred to him which bears date the 30th day of June 1892 and
"having thereby found and adjudged that Joseph Barber of the vil-
"lage of Georgetown in the county of Halton, gentleman, is a
"suitable and proper person to be appointed the said trustee in the
"place of the defendant Jacob P. Clark, and the plaintiffs and de-
"fendant each appealing from the said report as to certain of
35 "the matters in question herein respectively and the said ap-
"peals coming on for hearing this day and counsel for both
"parties consenting thereto.

"1. It is ordered that the finding of the said master that the said
"Joseph Barber is a suitable and proper person to be appointed
"trustee as aforesaid be confirmed;

"2. And it is further ordered that argument of the said appeals
"stand adjourned to a day to be arranged therefor.

"3. And it is further ordered that the said Joseph Barber of the vil-
"lage of Georgetown in the county of Halton, gentleman be and he
"is hereby appointed trustee of the estate of Jessie Barber in the
"pleadings mentioned in the place and stead of the defendant Jacob
"P. Clark.

"4. And it is further ordered that the said defendant Jacob P.
"Clark do pending the final disposition of the said appeals pay to
"the said Joseph Barber the sum of (\$5,000) five thousand dollars
"portions of the moneys of the said estate now in the hands of the
"said defendant Jacob P. Clark as found by the said report and that
"such payment when made shall be to that extent a discharge of the
"said Jacob P. Clark from liability in respect of so much of the said
"trust moneys and shall be without prejudice to all rights of either
"party upon the said appeals and otherwise in this action.

"On the motion of Mr. Aylesworth of counsel for the plaintiffs,

"By the court.

"(S'd)

M. B. JACKSON, *Registrar.*

36

(Final Judgment on Further Directions.)

" In the High Court of Justice, Common Pleas Division.

" Before the Honorable Mr. Justice Street.

" In Court, Thursday, the 3rd Day of May, A. D. 1894.

" Between—

" JAMES BARBER, AGNES F. HUTTON, and ISABELLA J. CROSS,

" Plaintiffs,

" and

" JACOB P. CLARK, Defendant.

" (Law stamp, \$1.60.)

" [L. s.]

" This action coming on this day to be heard before this court on
 " further directions and as to the question of costs in the presence
 " of counsel for the plaintiffs and defendants and upon hearing read
 " the pleadings in this action, the reporter's notes of the proceedings
 " at the trial and the judgment of reference thereupon ordered under
 " date the 30th day of April 1891, the order made herein by the
 " local judge of this court at Brampton on the 30th day of October,
 " 1891 extending the time for the making of the master's report
 " under the said judgment and the subsequent order made herein by
 " the Hon. Mr. Justice Falconbridge in court on the 9th day of Decem-
 " ber, 1891, with the affidavits of William H. Cross, James Oscar Hut-
 " ton and Benjamin Franklin Justin (2) filed upon the said applica-
 " tion and the further orders extending the time for the making of the
 " said master's report made herein in court on 2nd day of February
 " 1892, and on the 26th day of April 1892, and the report of the master
 " herein dated the 30th day of June, 1892, and the orders made
 37 " herein upon appeal from the said report dated respectively
 " the 16th day of September, 1892, and the 24th day of Feb-
 " ruary 1893, by the latter of which orders the said report of the
 " master is amended as in the said order shown and a reference back
 " directed to fix the remuneration which the defendant ought to re-
 " ceive in respect of his services under the will in the pleadings
 " mentioned and also the subsequent report of the said master bear-
 " ing date the 14th day of October, 1893, and the order on appeal
 " therefrom dated the 13th day of April 1894, and also the affidavits
 " of Allen Bristol Aylesworth and of Benjamin Franklin Justin filed
 " on behalf of the plaintiffs upon this application with the exhibits
 " in the said affidavits referred to and the affidavit of William Laid-
 " law filed in answer and the exhibits in the said affidavit re-
 " ferred to and upon hearing what was alleged by counsel afore-
 " said.

"1. This court doth order and adjudge that the defendant do forthwith deliver over to Joseph Barber, the trustee of the estate of Jessie Barber named in the above-mentioned order made herein on the 16th day of September 1892, a certain promissory note for the sum of \$1,000 made by the above-named plaintiff James Barbour, and which is referred to in the report of the master aforesaid, dated the 30th day of June, 1892.

"2. And this court doth further order and adjudge, that the defendant do pay to the said Joseph Barber as such trustee as aforesaid the balance in his hands of the trust funds of the said estate being the sum of \$7,423.50 with interest thereon from the 30th day of June, 1892, but deducting from the said amount the sum
38 "of \$5,000 paid by the said defendant to the said Joseph Barber on the 6th day of October 1892, and the further sum of \$500 similarly paid on the 13th day of October 1892, with interest on the said sums of \$5,000 and \$500 from the date of their respective payments.

"3. And this court doth further order that upon the taxation of costs in this action the taxing officer do allow and tax to the defendant such costs as he would be entitled to had he presented an ordinary unopposed petition to the court asking his discharge and the appointment of a new trustee in his stead, and of passing his accounts of his dealings with the estate in question, also the costs of supporting upon the reference herein any items unsuccessfully objected to by the plaintiffs in the said accounts and also of successfully contesting on the said reference any items of the plaintiffs' surcharge to the defendant's said accounts; the said costs to be taxed between solicitor and client, and to be paid out of the estate in question or set off as the case may be.

"4. And this court doth further order that the defendant do forthwith after taxation thereof pay to the plaintiffs their costs of this action down to and inclusive of the hearing, together with the costs of the several orders extending the time for the master to make his report including the costs of the application upon which the order of 9th December 1891 was made, also the costs of the reference back to the said master under the order of the 24th of February 1893, including the costs of the appeal from the report of the 30th day of June 1892, so far as the same related to the remuneration

"allowed to the defendant, together with the general costs of
39 "the reference before the said master (except the costs hereinbefore specified as taxable to the defendant) but including the costs of supporting any items of the surcharge as to which plaintiffs succeeded and of attacking any items of defendant's account to which they successfully objected, and the costs of this motion.

"On the motion of Mr. Aylesworth, Q. C., of counsel for the plaintiffs.

"BY THE COURT.

"The costs of the plaintiffs under the above judgment have been

"taxed and allowed at the sum of \$848.30 as appears by a taxing officers certificate dated the 26th day of November, A. D. 1895.

"(S'g'd)

J. A. AUSTIN,

"*Local Registrar at Brampton.*

"Judgment signed the 18th June 1894:

"(S'g'd)

A. F. McLEAN,

"*Cl'k Weekly Court.*

"(S'g'd)

J. A. AUSTIN,

"*Local Registrar at Brampton.*

"Judgment entered the 18th June 1894 in Judgment Book of H. C. J. folios 150-151, 152.

"(S'g'd)

J. A. AUSTIN,

"*Local Registrar at Brampton.*"

All and singular which premises by the tenor of these presents we have commanded to be exemplified.

Witness the Honorable John Alexander Boyd, president of our high court of justice at Toronto this twenty-sixth day of February in the year of our Lord one thousand eight hundred and ninety-seven.

[SEAL.]

J. A. AUSTIN,

Local Registrar at Brampton.

40.

Authentication of Record.

In the High Court of Justice, Common Pleas Division.

I, James Augustus Austin, local registrar at Brampton, of the said court do hereby certify that the writing annexed to this certificate is a true copy and exemplification of the original writ of summons, affidavit of service and return of service, pleadings, judgment at trial, order appointing new trustee and final judgment on further directions, on file and of record in said office and that said originals constitute the record of said proceedings and judgments of said court in this cause.

[SEAL.]

Witness my hand and the local seal of said high court at Brampton this twenty-sixth day of February, 1897.

J. A. AUSTIN,

Local Registrar at Brampton.

I, John Alexander Boyd, president of the high court of justice do certify the foregoing attestation by James Augustus Austin, local registrar of said court at Brampton, to be in due form.

Witness my hand this 27th day of February, 1897.

(Signed)

J. A. BOYD,

President H. C. J.

(Stamp, 50c.)

41

I, James Augustus Austin, local registrar of said court hereby certify that the Honorable John Alexander Boyd whose genuine signature is subscribed to the foregoing certificate,

was at the time of signing and attesting the same, president of said court, duly commissioned and qualified.

Witness my hand and the local seal of said high court at Brampton, this 2nd day of March, 1897.

[SEAL.]

J. A. AUSTIN,
Local Registrar at Brampton.

I James Fleming inspector of legal offices for Ontario do certify the foregoing attestation by James Augustus Austin the local registrar of the high court of justice at Brampton to be in due form.

Witness my hand this 27th day of February, 1897.

(Signed)

JAS. FLEMING,
Inspt. Legal Offices, Ontario.

42 To the admission of which the defendant, by his counsel, objected on the ground of variance, in that the declaration declared on a decree of the high court of justice, common pleas division, Ontario, in the Dominion of Canada, dated the 3rd day of May, 1894, whereas at the end of said transcript it appears that judgment was signed on the 18th day of June, A. D. 1894, and judgment entered on the 18th day of June 1894, in Judgment Book H. C. J. folios 150, 151 and 152, but the presiding justice upon consideration that the defendant had theretofore at a former trial of this cause had February 26th 1900 objected that there was a variance between the said transcript and the plaintiff's amended declaration filed in this cause on the 18th day of March, 1897, which amended declaration declared on a decree of the high court of justice, common pleas division, signed and entered on the 18th day of June 1894, whereas the final decree of the court was signed on the 3rd day of May, A. D. 1894, which objection of the said defendant was then sustained and the plaintiff amended his declaration to conform to the objection of the defendant and the ruling of the court, overruled said objection and allowed the said transcript to be read to the jury, to which ruling the defendant, by his attorney, then and there excepted.

Whereupon the plaintiff rested.

Thereupon the defendant, by his attorney, prayed the court to instruct the jury that on the whole evidence if believed by the jury, the plaintiff was not entitled to recover because the transcript offered in evidence was not a complete transcript, because the judgment

therein recited was not a final judgment, because the record
43 failed to disclose the taxation of costs in favor of the defendant, but the presiding justice refused to so instruct the jury, to which refusal the defendant, by his attorney, then and there excepted.

Thereupon the defendant, by his attorney, offered to prove by the defendant the amount of costs taxed to him to which offer the plaintiff then and there objected, on the ground that the record was the best evidence of any costs taxed and allowed to the defendant, and as the complete transcript of the record was before the court and no

costs were taxed or allowed to the defendant it was not proper to prove by the defendant what, if any, costs had been incurred by him as defendant to the present action, which objection was sustained by the justice, to which ruling the defendant, by his attorney, then and there excepted, and the defendant offered no further evidence.

Thereupon the defendant offering no evidence to the jury, the court, on the motion of the plaintiff, instructed the jury to find a verdict for the plaintiff for the amount claimed, to which instructions of the court the defendant, by his attorney, then and there and before the jury retired, excepted.

And be it further remembered that each one of the separate and several exceptions taken by the counsel for the defendant, to the several rulings of the court during the trial and to the charge of the court to the jury were so taken at the time and prior to the retirement of the jury to consider of their verdict and were noted by the justice presiding at the trial upon his minutes at the time the same were taken by counsel for the defendant and at the request of said counsel the foregoing bill of exceptions is signed and sealed, now for then, this — day of — A. D. 1901.

E. F. BINGHAM,
Chief Justice.

*Order for Incorporation in Record of Plaintiff's Amended Declaration,
Filed March 18, 1897.*

Filed January 21, 1902.

In the Supreme Court of the District of Columbia.

JOSEPH BARBER, Trustee,	} At Law. No. 40539.
vs.	
JACOB P. CLARK.	

The clerk of said court will please, in preparing the record for the Court of Appeals in the above cause, include the plaintiff's amended declaration filed in the cause March 18, 1897.

W. H. SHOLES,
Attorney for Plaintiff.

45 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, inclusive, to be a true and correct transcript of the record, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 40539, at law, wherein Joseph Barber, trustee, is plaintiff, and Jacob P. Clark is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court
of the District of
Columbia.

In testimony whereof, I hereunto subscribe
my name and affix the seal of said court, at
the city of Washington, in said District, this
28th day of January, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

46 In the Court of Appeals of the District of Columbia.

JACOB P. CLARK, Appellant, }
vs. } No. 1175.
JOSEPH BARBER, Trustee. }

Designation of Record to be Printed.

Now comes the appellant, by his attorneys, and designates the following as the portions of the record which he desires to be admitted in the printing of the same, to wit: so much of the bill of exceptions as is found between pages 17 to 35, inclusive, of the present record, since the same relates exclusively to proceedings in the Canadian court, having occurred prior to the judgment upon which suit was brought below.

The material error upon which this appeal is prosecuted is that the appellee declared upon a decree which was interlocutory and not final. The portion of the record appellant requests shall be omitted from the printing has no relevancy whatever to the question to be presented to this court.

BRANDENBURG & BRANDENBURG,

Attorneys for Appellant.

Rec'd copy of above Feb. 4, '02.

W. H. SHOLES,
Per BROSNAN.

(Endorsed :) No. 1175. Court of Appeals D. C., January term, 1902. Jacob P. Clark, appellant, vs. Joseph Barber, trustee. Appellant's assignment of errors and designation of parts of record to be omitted in printing. Court of Appeals, District of Columbia. Filed Feb. 4, 1902. Robert Willett, clerk.

47 In the Court of Appeals of the District of Columbia.

JACOB P. CLARK, Appellant, }
vs. } No. 1175.
JOSEPH BARBER, Trustee. }

Designation on the Part of the Appellee of the Part of the Record to be Omitted.

Now comes the appellee, by his attorneys, and designates the following as the only portion of the record which he consents to be omitted in the printing of the same; to wit, so much of the bill of

exceptions as is found between pages 17 and 21, inclusive, of the present record.

W. H. SHOLES,
HAYDEN JOHNSON,
Att'y- for Appellee.

(Endorsed:) No. 1175. Court of Appeals D. C., January term, 1902. Jacob P. Clark, appellant, *vs.* Joseph Barber, trustee. Appellee's designation of parts of record to be omitted in printing. Court of Appeals, District of Columbia. Filed Feb. 6, 1902. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1175. Jacob P. Clark, appellant, *vs.* Joseph Barber, trustee. Court of Appeals, District of Columbia. Filed Jan. 29, 1902. Robert Willett, clerk.

